Supreme Court No. 81594-1
COA No. 59468-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY ERICKSON,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable James Allendoerfer

SUPPLEMENTAL BRIEF OF PETITIONER ERICKSON

OLIVER R. DAVIS
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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UNITED STATES SUPREME COURT CASES

A. INTRODUCTION

This Court granted review of the March 31, 2008, decision by the Court of Appeals (Division One), in COA No. 59468-1, affirming the Snohomish County Superior Court's denial of Anthony Erickson's CrR 3.6 motion to suppress drug evidence that was obtained in a jail booking search, following his arrest on a bench warrant issued by the Lynwood Municipal Court.

B. ISSUE PRESENTED ON REVIEW

Whether the trial court erred in its CrR 3.6 hearing in admitting evidence that was seized as the product of a seizure supported by a warrant issued without an on-the-record judicial finding of a well-founded suspicion that the defendant had committed a probation violation, as required under the Washington Constitution, the United States Constitution, CrRLJ 3.2(k)(1), and this Court's decision in State v. Fisher, 145 Wn.2d 209, 35 P.3d 366 (2001).

C. STATEMENT OF THE CASE

Following a consensual police-citizen encounter between the petitioner Anthony Erickson and Lynnwood police officer Jason Valentine, near Highway 99 in Lynnwood, Washington, the officer

ran Mr. Erickson's name through a warrant database in his patrol vehicle, and discovered that there was a bench warrant for the defendant's arrest from the Lynwood Municipal Court case C38418 LWP, issued on October 4, 2006. 12/21/06VRP at 12-13; CP 29-31. The officer re-located Mr. Erickson, who was on foot, and arrested him on the warrant, following which an amount of cocaine was located on his person in a jail booking search. 12/21/06VRP at 7, 10; CP 29-31, 124. The warrant had been issued following the filing, on August 18, 2006, of a "NOTICE OF PROBATION VIOLATION" from the Lynwood Probation Department. CP 119. Mr. Erickson had been convicted in that court on August 17, 2005, of fourth degree assault. CP 117.

In a CrR 3.6 hearing, relying on various provisions of CrRLJ 2.2, Mr. Erickson challenged the validity of the municipal court warrant on ground that no documentation evidenced any judicial finding of probable cause supporting the alleged probation violations. CP 67-73; 12/21/06VRP at 62-65. The State asserted that the warrant in question was justified merely by Mr. Erickson's failure to appear in court for the probation violation hearing on these matters, scheduled for October 2, 2006, and asserted that

this failure was personally observed by the judge and that a bench warrant therefore was properly issued under CrR 2.5 without further documentation of any probable cause. CP 45-64; 12/21/06VRP at 57.

Following argument, the trial court held that the State's position was correct because CrRLJ 2.5 allows a court to issue a bench warrant where a defendant fails to appear for a hearing as to which he has been given notice. CP 65-66. The trial court held:

> The time and place for a due process hearing on probable cause is at the duly scheduled probation violation hearing held in open court. Defendant was sent notice of such hearing, and summonsed to appear. Unfortunately, he had changed his mailing address without notifying the City, and apparently did not receive the notice. He failed to appear. The only remaining remedy for the Municipal Court was to issue a bench warrant. Following Defendant's arrest a full hearing was timely held by the Court on the underlying allegations relating to Defendant's probation violations. He was found guilty and was sanctioned with jail time.

CP 66. Mr. Erickson was convicted of possession of a controlled substance in a stipulated bench trial, following the court's CrR 3.6 ruling. CP 4-15, 65-66. He was ordered to serve 90 days confinement, and he appealed. CP 4-15, 16.

On direct appeal, Division One held that the bench warrant for Erickson's arrest was expressly authorized by the applicable court rules, which allow a municipal court to issue a bench warrant "when a defendant fails to appear." Erickson, 143 Wn. App. at 664. Citing CrRLJ 2.2(b)(5), the panel noted that the rule provides for the issuance of a warrant for the arrest of a defendant who "fails to appear in response to a summons . . . if the sentence for the offense charged may include confinement in jail." In addition, the appellate court noted that CrRLJ 2.5 provides for issuance of a bench warrant for the arrest of any defendant who has failed to appear before the court as required under that rule's language. Erickson, 143 Wn. App. at 664.

Mr. Erickson sought review and this Court granted review. State v. Erickson, 164 Wn.2d 1030, 2008 Wash. LEXIS 1197 (November 5, 2008).

D. ARGUMENT

THE WARRANT FOR MR. ERICKSON'S ARREST WAS NOT BASED ON A JUDICIAL FINDING OF ADEQUATE CAUSE OR SUSPICION, MEMORIALIZED ANYWHERE ON THE RECORD, TO BELIEVE HE HAD COMMITTED A VIOLATION OF HIS PROBATION.

1. **At a minimum, a probationer's diminished expectation of privacy requires judicial determination of the existence of a well-founded suspicion of a probation violation before an arrest warrant may issue.** Mr. Erickson's appeal raises the question whether a bench warrant issued for his arrest based on the belief he violated probation conditions following an assault conviction in Lynwood Municipal Court, may be deemed supported by authority of law where the record below reveals no judicially-scrutinized determination of any degree of suspicion to conclude that Erickson committed a probation violation.

The Washington Constitution, Article I, § 7, provides that "no person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. art. 1, § 7. When served, a warrant of arrest disturbs a person in his private affairs, and thus such a warrant shall not issue "without authority of law,"

regardless of whether it is labeled an administrative warrant, an arrest warrant, a bench warrant, or something else. State v. Walker, 101 Wn. App. 1, 5-6, 999 P.2d 1296 (2000) (citing City of Seattle v. McCready (McCready II), 124 Wn.2d 300, 309-10, 877 P.2d 686 (1994)). In addition, the Fourth Amendment to the United States Constitution provides that "no warrants shall issue, but upon probable cause, supported by oath or affirmation[.]" U.S. Const., amend. IV; see U.S. Const., amend. XIV.

The Walker case involved a bench warrant for a failure to appear that was signed and issued by a court clerk, contrary to the provisions of CrRLJ 2.2 and otherwise unauthorized by statute or code. State v. Walker, 101 Wn. App. at 3. The remedy in Walker was suppression given that there was no probable cause finding made by a judge on the record. State v. Walker, 101 Wn. App. at 11-12.

In the present case, the parties placed into evidence the docket from the Lynnwood Municipal Court and all documentation from the issuance of the warrant. Supp. CP ___, Sub # 23 (Exhibits 1-3); CP 117-20. The docket in Case # 000038418 from the Lynnwood Municipal Court indicated that on August 8, 2006, a

probation violation report was filed with the court arising out of the defendant's prior conviction for fourth degree assault. On September 7, 2006, the Notice of Probation Violation hearing was returned to the court, with an indication that no forwarding address for the defendant was known. CP 68.

Then, on October 2, 2006, Mr. Erickson failed to appear at the probation violation hearing, and a $5,000 bench warrant was issued. CP 68. The record of the hearing does not contain a finding of probable cause for probation violations at the time of the hearing. The docket does not contain a notation of the court finding probable cause, or any other degree of suspicion, for probation violations. CP 117-20. The warrant, which was issued after the failure to appear at the probation violation hearing, noted "Failure to Appear" and "Failure to Comply with Court Order". Exhibit 1; Exhibit 3. There is no indication that a court ever passed on the question whether any standard of cause had been established.

It is a well-accepted principle of privacy law -- the federal constitution's principle that one's person is protected from intrusions into one's reasonable expectation of privacy, and the

state constitutional principle, expressly enforced by article 1, section 7, that one's private affairs may not be invaded by the state without authority of law - that law enforcement may not seize a citizen absent adequate legal cause. The mechanism by which these rights are enforced is the requirement of a warrant, and the requirement that in cases of seizure without a warrant, that the State must prove the existence of one of a very few narrow exceptions to the warrant requirement.

In the former instance, the legal rationale supporting warrant-based seizures is the assurance that the basis for a warrant's issuance will be established by a "neutral magistrate," who will ensure that individuals' private affairs are not invaded upon by whim, but only by the authority of law. Whether that "authority of law" consists of a requirement of probable cause, or some diminished standard applicable to probationers like Mr. Erickson such as "well-founded suspicion," is less important in the present case than the simple imposition of some standard -- deemed to exist on the record by that aforementioned neutral magistrate -- before a person can be snatched from the public square and held.

The U.S. Supreme Court, and this Court, have long stated that probationers have due process rights. Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972). Morrissey is the seminal case involving an individual's due process rights at a parole revocation hearing. The minimum protections required are (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless there is good cause for not allowing confrontation); (e) a "neutral and detached" hearing body; and (f) a written statement by the factfinders as to the evidence relied on, and reasons for, revoking parole. State v. Abd-Rahmaan, 154 Wn.2d 280, 286, 111 P.3d 1157 (2005) (citing Morrissey, 408 U.S. at 489); see also City of Seattle v. Lea, 56 Wn. App. 859, 860, 786 P.2d 798 (1990).

As noted in State v. Abd-Rahmaan, these protections exist to "ensure that a revocation of parole will be based on verified facts and accurate information of the parolee's behavior." Abd-Rahmaan, 154 Wn.2d at 286. Prior to Morrissey v. Brewer, and Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d

656 (1973) (regarding parolees), probationers and parolees were often arrested and placed in confinement to serve previously imposed sentences without a hearing of any kind. The Morrissey and Gagnon cases recognized parole and probation status as "liberty and property" rights under the constitution, and they held that deprivation thereof could be accomplished only by virtue of due process.

However, due process protections also bear on an event that may, or may not be found within the chronologically-ordered series of diminished rights listed above. This event is arrest on a warrant, or a warrantless arrest, predicated on someone's "belief" that the probationer has engaged in conduct constituting a violation of conditions of probation. Whether that belief needs merely to be an unsubstantiated whim unreviewed by a neutral court is the issue presented, and in Mr. Erickson's direct appeal below, the Court of Appeals concluded that the degree of suspicion necessary for a municipal court to issue a bench warrant for the arrest of a probationer who fails to appear for a probation violation hearing is simply the original determination of "probable cause for the original

crime of which he or she was convicted." State v. Erickson, 143 Wn. App. at 666-67.

But this Court has specifically held that issuance of a bench warrant for the arrest of a person who has been adjudged guilty of a felony, and is subject to conditions of release, requires a "well-founded suspicion" that violation of a condition of release has occurred. State v. Fisher, 145 Wn.2d 209, 35 P.3d 366 (2001). This is the standard that was not applied in the instant case.

The question presented in Fisher was whether CrR 3.2(j)(1), authorizing a superior court to issue a bench warrant for arrest upon a verified application, alleging with specificity willful violation of a condition of release, requires a showing of any quantum of cause or suspicion for issuance of such warrant for a defendant previously found "guilty" and released on conditions pending sentencing. The rule, entitled "Arrest for Violation of Conditions," reads as follows:

> *Arrest with warrant.* Upon the court's own motion or a verified application by the prosecuting attorney alleging with specificity that an accused has willfully violated a condition of the accused's release, a court shall order the accused to appear for immediate hearing or issue a warrant directing the arrest of the

> accused for immediate hearing for reconsideration of conditions of release pursuant to section (i).

CrR 3.2(j)(1). This rule now appears at CrR 3.2(l)(1). Its significance as the subject of this Court's decision in Fisher is that the CrRLJ rules 2.2 through 2.5 relied on by the Court of Appeals in Mr. Erickson's case (and unfortunately relied upon by the defendant's trial counsel and appellate counsel), apply to "Procedures Prior to Arrest And Other Special Proceedings." State v. Erickson, 143 Wn. App. at 664.

However, CrRLJ 3.2(k)(1), which is identical in every substantive respect to the subsection of CrR 3.2 addressed in Fisher, surely applies to arrests for violations of post-conviction conditions in the Lynwood Municipal Court. CrRLJ 7.6, entitled "Probation," references the release status of defendants as governed by CrRLJ 3.2. The "well-founded suspicion" standard applied in Fisher must apply to Mr. Erickson's case, and as noted infra, there is nothing in the record to even hint that such standard, or indeed any standard of cause or suspicion, was deemed satisfied by a judge before a warrant went out allowing Anthony Erickson to be snatched off the street.

Certainly, the decision of the Court of Appeals that a defendant's underlying conviction allows him to be arrested on warrants unsupported by any cause, merely because they involve later probation on the conviction, cannot stand against this Court's decision in Fisher. The Court of Appeals' citation to this Court's decision in Watson is, in this respect, inapposite. Erickson, at 662 ("Any punishment imposed for a probation violation relates to the original conviction for which probation was granted."). What this Court was holding in Watson was that convicted sex offenders must register upon release from custody if they were in custody "as a result of" the sex offense that triggered registration, including when the offender was in custody due to violating conditions of his or her community custody on that sex offense. State v. Watson, 160 Wn.2d 1, 8-10, 154 P.3d 909 (2007). Watson does not apply here to allow issuance of arrest warrants on probation violations simply because probation arises out of a preceding conviction.

Interestingly, the Court of Appeals in the present case made much of the assertion that Mr. Erickson had been summonsed to appear and had failed to do so, and that therefore, the Court of Appeals reasoned, the instant case involved the question of the

propriety of the court issuing a bench warrant for a failure to appear which the court must necessarily have personally observed. Erickson, at 661-63. The Court of Appeals stated:

> The municipal court issued a warrant not because it found that Erickson had violated his probation but because he was convicted of assault and subsequently failed to appear for a hearing at which the court could make a determination regarding an alleged probation violation.

Erickson, at 662. But this circular reasoning begs the question. The same reasoning was unsuccessful in the case of State v. Parks, 136 Wn. App. 232, 148 P.3d 1098 (2006), in which the Court of Appeals found that a judge must find probable cause prior to issuing a warrant for failure to appear when a case is in pretrial status at the Municipal Court level. The decision importantly holds that at that stage of a criminal case a finding of probable cause for the underlying offense must support a bench warrant issued for failure to appear at trial on the charge. State v. Parks, 136 Wn. App. at 237. The contention that the arrest warrant was issued simply for a failure to appear as ordered failed in Parks, and fails here, as an overly-narrow characterization of the record and the events of the case.

2. The existence of a well-founded suspicion of a probation violation supporting the issuance of an arrest warrant must be determined on the record. Furthermore, an additional issue in the present case is one of an adequate record of a judicial finding of "well-founded suspicion." The Municipal Court has a constitutional duty to the defendant to issue a ruling with a clear record. See Gerstein v. Pugh, 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1974) (finding of probable cause must be memorialized in the record).

> Taken as a whole, the criminal rules for the courts of limited jurisdiction are designed to enforce, not evade, the constitutional command. There should have been a judicial finding of probable cause, made on the record before the court attempted to force Parks to appear in court. We hold that making such a finding is not only a "best practice" but also a constitutional obligation of the issuing court.

State v. Parks, 136 Wn. App. at 239.

Based on these authorities, the arrest warrant in Mr. Erickson's case was required to be, but in was not, supported by a finding of adequate cause made on the record. In the case at bar, the record is wholly inadequate to determine whether well-founded suspicion was found and whether there was a sufficient basis for

such a finding. There was certainly nothing sufficiently specific to allow any court to assess the legal validity of the warrant. It is a simple matter to place on the record a statement of the basis for well-founded suspicion, and the critical conclusion that the court has determined that this standard has been met. Exhibits 1, 3.

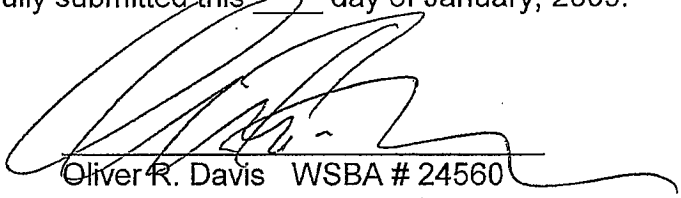
3. Suppression and reversal are required. Evidence which is the product of an unlawful search or seizure is not admissible. Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). Evidence will be excluded as fruit of the illegal seizure unless the illegality is not the "but for" cause of the discovery of the evidence, and suppression is required where the challenged evidence is in some sense the product of illegal governmental activity. Segura v. United States, 468 U.S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 599, 615 (1984) (citing United States v. Crews, 445 U.S. 463, 471, 100 S.Ct. 1244, 1249, 63 L.Ed.2d 537 (1980)). Here, the cocaine found on Mr. Erickson's person would not have been discovered but for Officer Valentine's illegal detention of Mr. Erickson. For this reason, and based on the foregoing, Mr. Erickson asks that this Court reverse the Court of

Appeals, reverse the trial court's order denying his motion to suppress, and reverse his conviction.

E. CONCLUSION.

Based on the foregoing, Mr. Erickson respectfully requests that this Court reverse the judgment and sentence of the trial court.

Respectfully submitted this 23 day of January, 2009.



Oliver R. Davis WSBA # 24560
Washington Appellate Project - 91052
Attorneys for Petitioner

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, ANTHONY ERICKSON, Appellant.	)))))))))	NO. 81594-1

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 23RD DAY OF JANUARY, 2009, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE FILED IN THE **WASHINGTON STATE SUPREME COURT** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	MARY KATHLEEN WEBBER SNOHOMISH COUNTY PROSECUTING ATTORNEY 3000 ROCKEFELLER EVERETT, WA 98201	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON, THIS 23RD DAY OF JANUARY, 2009.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711